No. 16,536

In the

United States Court of Appeals

For the Ninth Circuit

United States Fidelity and Guaranty Company, a corporation,
Appellant,

vs.

Roscoe B. Smith and Ida Smith, Ronald G. Callahan, Harold L. Smith, Ruth Smith and Ronald M. Smith,
Appellees.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

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No. 16536

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UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

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REPLY TO POINT ONE

Appelees urge the Court to adopt the so-called "liberal rule" that once permission to use the car is given for any purpose, permission to use it for all purposes is implied. They argue that this rule would express the public policy of Arizona as declared by the Motor Vehicle Financial Responsibility Act (A.R.S. § 28-1101, *et seq.*).

The Arizona Motor Vehicle Financial Responsibility Act is not a compulsory insurance law. The Act merely pro-

vides for suspension of the license of an operator (or motor vehicle registration of an owner) involved in a certain type of accident, unless there is in effect an insurance policy covering the liability of the operator for damages resulting from the accident. A.R.S. § 28-1142 The Act does not apply (A.R.S. § 28-1143):

> "3. To the owner of a motor vehicle if *at the time of the accident* the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating the motor vehicle without permission." (Emphasis supplied)

If an operator fails to pay, or make proper arrangements to pay, a judgment against him within 60 days after it is rendered, the operator's license will be suspended. A.R.S. § 28-1161, 1162 The license will remain suspended until the judgment is satisfied, in whole or in part, and the operator gives proof of financial responsibility in the future. A.R.S. § 28-1163 Such proof may be in the form of a certificate that there is in effect a motor vehicle liability policy for the operator's benefit, but in that event the policy must "insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured * * *." A.R.S. § 1168, 1170.

The Act does not express a public or legislative policy in Arizona in accord with the so-called "liberal rule". It expresses just the opposite. According to the liberal rule there is permission under the omnibus clause, regardless of the use made of the car at the time of the accident, if there was permission to use the car in the first instance. Under A.R.S. § 28-1143, the Act does not apply to the owner of the car if it was being operated without his express or implied permission *at the time of the accident.* If the Arizona

Legislature has indicated a policy, the policy is expressed by the minor deviation rule: Permission exists only when, at the time of the accident, the car is being used at a time or place or for a purpose contemplated by the parties when permission was first given, or else the use is merely a slight deviation therefrom.

None of the cases cited by Appellees relies upon a financial responsibility act such as Arizona's as the basis for adopting the liberal rule. In *Arnold v. State Farm Mutual Insurance Co.,* 260 F.2d 161 (C.A. 7 Ind., 1958) the only Indiana statute mentioned is one requiring all liability insurance policies issued in Indiana to contain an omnibus clause. In *Konrad v. Hartford Accident & Indemnity Co.,* 11 Ill. App. 2d 503, 137 N.E. 2d 855 (1956) the court made mention of the financial responsibility act of Illinois, but was actually dealing with a compulsory insurance statute applicable to common carriers. In *Dickinson v. Great American Ind. Co.,* 296 Mass. 368, 6 N.E. 2d 439 (1937) the court was again dealing with a compulsory insurance statute. We note that while the court, in *Dickinson,* adopts the liberal rule, it didn't apply that rule, and instead affirmed a judgment for the insurer even though the facts disclosed initial permission.

There is no compulsory insurance statute in Arizona. The Arizona Motor Financial Responsibility Act supports the minor deviation rule. There is no permission unless there is express or implied permission for the use made of the car at the time of the accident, not just initially. If, at the time of the accident, the car is not used at a time or at a place or for a purpose contemplated by the parties when the use was initially permitted, there is no coverage under the omnibus clause unless the deviation from permitted use is minor.

REPLY TO POINT TWO

Appellant is accused of shunning a discussion of implied permission. This accusation demonstrates either a lack of understanding of the legal principles involved, or a lack of any meritorious answer to Appellant's position.

The truth is that Appellant's entire brief is devoted to the question of implied permission.[1] There are two rules of "implied permission". One rule is that express permission for any given purpose *implies* permission for all purposes. The second rule is that express permission for a given purpose does not *imply* permission for all purposes, and unless permission for the actual use made at the time of the accident can be *implied,* there is no coverage under the omnibus clause.[2]

Appellees do not answer Appellant's proposition that Callahan's use of the Jeep from 2 o'clock to 6:30 in the morning, at a place 18 miles from Phoenix, for the purpose of running away from home or joy riding, was a radical departure from the use contemplated by R. B. Smith and Callahan when Callahan was originally permitted to use the Jeep. Rather, they quote certain portions of the testimony, out of context, and contend that this testimony supports a finding that Callahan had implied permission to use the Jeep at the time and place of the accident in question.[3] When the isolated testimony is considered in context and in

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1. See first paragraph at top of page 10, Appellant's Opening Brief.

2. Permission for the actual use at the time of the accident may be expressly given, but in this case it is conceded there was certainly no express permission.

3. The District Court did not make a finding of "implied" permission. It was specifically asked to do so (Tr. 22-23) and refused. As pointed out in Appellant's Opening Brief (page 23), the District Court's finding of permission was based upon the liberal rule.

company with the applicable rules of law, Appellees' contention is found to have no merit.

First, Appellees quote the testimony of R. B. Smith that he expressed no restrictions on Callahan's use of the Jeep. Appellees do not quote all the additional testimony that when R. B. Smith permitted Callahan to use the Jeep, he told Callahan he was letting Callahan use it for the purpose of having transportation to and from work; and that was the only purpose.[4] Smith and Callahan also understood, apparently without discussion, that Callahan could use the Jeep to run errands to the grocery and drug store.[5] Under both the law and the facts, Callahan's use of the Jeep was restricted to those purposes. The law was well-stated by this Court in *Trotter v. Union Indem. Co.*,[6] 35 F.2d 104 at 105-106 as follows:

> "* * * the most that can be said for appellant is that restrictions upon the use of the car were not expressed by the owner when he gave Hickey possession thereof. But, admittedly, the only object Grill had was to aid Hickey in carrying to success the business enterprise in which they were both interested. Hence a restriction to that purpose, in the absence of evidence to the contrary, is clearly implied. * * *"

Here, the only purpose was to provide Callahan with a means of getting back and forth to and from work, and running errands. There was no evidence to the contrary. Furthermore, Callahan knew and understood that his use of the Jeep was restricted to those purposes.[7]

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4. Tr. 39, 42, 92-94.

5. Tr. 47-48, 94.

6. Briefed and quoted from at length in Appellant's Opening Brief, pages 14-15.

7. Tr. 47-48, 51, 94.

In order to fully understand the other testimony quoted by Appellees, it must be put back into context. Also, it is necessary to legally define implied permission. "Implied permission" has been defined in varying ways. It is said to be something more than mere sufferance or tolerance without taking steps to prevent. 45 *C.J.S., Insurance,* Sec. 829, p. 927. It is also said to be an inference arising from a course of conduct in which there is mutual acquiescence or lack of objection signifying consent.[8] Appellees have failed to show wherein there is any evidence to support an inference that Callahan was using the Jeep at the time and place of the accident with the "acquiescence" or "consent" of R. B. Smith.

Putting the testimony back into context, it amounts to this: At some time prior to the accident Callahan took the Jeep without permission and returned to his home in California. R. B. Smith did not reprimand Callahan when the latter came back to Arizona.[9] Callahan had the unrestricted right to buy gasoline for R. B.'s trucks, and R. B. knew the gasoline bills were running high, but he didn't know for which trucks the gasoline was purchased.[10] R. B. had a pretty good idea Callahan was running around in the Jeep, and in fact, Harold Smith told R. B. that Callahan was doing so. R. B. did not approve of this, but he didn't say anything to Callahan because Callahan was living with Harold, and Harold was supposed to supervise Callahan.[11] R. B. did tell Harold to see to it that Callahan had Harold's

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8. This definition is contained in *State Farm Mutual Auto. Ins. Co. v. Cook*, infra page 8, cited by Appellees.

9. Tr. 46-48.

10. Tr. 49-50.

11. Tr. 41, 47-48, 50-52, 60-63.

permission before taking the Jeep out in the evening to run around.[12] Callahan knew that he was supposed to have permission from Harold (his uncle) or R. B. (his grandfather) before taking the Jeep after work in the evening for purposes other than errands.[13] At the time of the accident Callahan had no permission to use the Jeep because he was not working, he was not on any errand and he had not sought or obtained permission from either Harold or R. B. to take the Jeep.[14]

The only conflict in the evidence is the testimony of Harold Smith that Callahan used the Jeep like it was his own, as opposed to the testimony of Callahan that he seldom went out in the evenings but when he did he first asked Harold's permission.[15] This conflict raises no inference of implied permission. Assuming Harold's version to be true, R. B. stated his disapproval and told Harold to not let Callahan run around in the Jeep without Harold's permission.

There is absolutely nothing in the evidence in this case to suggest that R. B. Smith "acquiesced" in or "consented" to Callahan's use of the Jeep for any purpose Callahan saw fit. All the evidence is to the effect that R. B. was very much opposed to any unauthorized use of the Jeep by Callahan and "acquiesced" therein or "consented" thereto only if Callahan first obtained Harold's permission.

The two cases cited by Appellees are not in point. In *Traders & General Ins. Co. v. Powell,* 177 F.2d 660 (C.A. 8 Ark., 1949),[16] there was evidence warranting the infer-

12. Tr. 47-48, 50, 62-63.

13. Tr. 94-97.

14. Tr. 45-46, 100-101, 105.

15. Tr. 59, 94-96.

16. In which there is a strong dissent.

ence that the owner not only knew the user was using the insured truck as his own, but also that the owner *acquiesced* in such use. In *State Farm Mutual Auto. Ins. Co. v. Cook,* 186 Va. 658, 43 S.E. 2d 863, 5 A.L.R. 2d 594 (1947), the evidence again warranted the inference that the owner not only knew of his employee's use of the insured truck for personal purposes, but that the owner also *acquiesced* therein; the evidence showed that the owner's attitude was that the employee could use the insured truck as he saw fit, but if he used it for his own purposes "it would be on his own hook."

Appellees would have the Court assume an attitude of "acquiescence" or "consent" on the part of R. B. Smith when all the evidence shows he had no such attitude. R. B. Smith testified, in effect: "When I found out that Callahan was using the Jeep to run around in, I told Harold to make sure he didn't do it without Harold's permission." Harold Smith testified, in effect: "I told R. B. that Callahan was running around in the Jeep. R. B. didn't like it, and he told me to not let Callahan use the Jeep to run around in." Callahan testified, in effect: "I was not supposed to take the Jeep in the evening to ride around without permission from R. B. or Harold." There is nothing in the evidence to warrant an inference that R. B. Smith "acquiesced" in or "consented" to Callahan's taking the Jeep at 2:00 o'clock in the morning, while Harold was asleep, for the purpose of running away from home or joy riding, and his subsequent driving around for approximately four hours, ending in an accident at a place 18 miles distant from Phoenix.

Appellees have made no attempt to answer the cases cited by Appellant as illustrating the application of the minor deviation rule.[17] Under that rule there is no question

17. Appellant's Opening Brief, pages 20-23.

that Callahan's use of the Jeep at the time of the accident was without "permission" under the omnibus clause. His use of the Jeep at the time of the accident was an extreme departure from the time, place and purpose intended or contemplated, not only at the time permission was originally granted, but at any time prior to the accident.

REPLY TO POINT THREE

Naturally, Appellees would like the Court to conclude that the evidence raises opposing inferences, one of which sustains the trial court, and to then summarily dispose of this case on the basis of the clearly erroneous rule. However, the evidence does not raise any opposing inferences of fact. The finding of "permission" was a legal inference as to the effect of the transactions or events disclosed by the evidence; there was no essential dispute as to what was said or done. The clearly erroneous rule is not applicable. This Court is free to draw its own conclusions. *Aetna Casualty & Sur. Co. v. DeMaison,* 213 F.2d 826 (C.A. 3 Pa., 1954)

We submit that Appellees have made no valid answer to the propositions in Appellant's Opening Brief. The minor deviation rule is the most fair and reasonable interpretation of the term "permission", and the rule most likely to be adopted in Arizona. Appellees do not challenge the cases cited by Appellant or even Appellant's statement of the facts. They quote certain portions of the testimony out of context, hoping to sell the idea of an inference that R. B. Smith "acquiesced" in or "consented" to any and all use of the Jeep by Callahan. But when the testimony is placed in context, no such inference can reasonably be drawn. The evidence shows, and both R. B. Smith and Callahan admit, that Callahan's use of the Jeep at the time of the

accident was beyond the scope of Callahan's permission. The District Court, therefore, erred in its finding that Callahan did have permission.

Respectfully submitted,

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